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IN THE

Supreme Court of the United States

October Term 1976

No. 76-336
No. 76-331

NORTH CAROLINA UTILITIES COMMISSION, SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents,

AND

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONS FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM J. BROWN
Attorney General of Ohio
(Other Counsel on Inside of Cover.)

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

CHARLES S. RAWLINGS
Assistant Attorney General
Chief, Public Utilities Section

CHERYL K. HACHMAN
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215

Attorneys for Amicus Curiae
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Now comes the Public Utilities Commission of Ohio (PUCO) by its counsel William J. Brown, Attorney General of Ohio, in support of the Petitions of the North Carolina Utilities Commission, the Southeastern

Association of Regulatory Commissioners, and the National Association of Regulatory Utility Commissioners (NARUC), et al., for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the cases of: *North Carolina Utilities Commission v. Federal Power Commission*,-F. 2d- (4th Cir. 1976), and *National Association of Regulatory Commissioners v. Federal Power Commission*,-F. 2d (4th Cir. 1976), which have not yet been formally reported. This *Amicus Curiae* Brief of the Public Utilities Commission of Ohio in support of the Petitions is filed pursuant to U.S. Sup. Ct. Rule 21 (4), 28 U.S.C. This filing has been made as promptly as possible as required by said rule.

INTEREST OF THE AMICUS CURIAE

The PUCO is the Commission created by the Legislature of the State of Ohio and charged with the responsibility, *inter alia*, for supervising and regulating telephone companies operating in the State of Ohio. *Ohio Revised Code* Sections 4905.02, 4905.04, and 4905.06 (1954). In accordance with that responsibility, the PUCO must assure that every telephone company operating in Ohio furnishes necessary and adequate service and that all charges made for such service are just and reasonable. *Ohio Revised Code* Section 4905.22 (1954). State commissions like the PUCO, in pursuance of their supervisory authority over rate making must have jurisdiction over facilities and entry into the market for terminal equipment in order to effectuate state policies with respect to charges.

Traditionally, the provision of terminal telephone equipment has been considered to be an integral part of the telecommunications service provided by tele-

phone companies. As such, it is an integral part and has a significant impact on other aspects of the total telephone service in Ohio subject to the regulation of the PUCO. Because the decision below would impair, if not destroy, the power of state commissions to pursue their rate making policies so far as terminal equipment is concerned, the PUCO strongly supports the Petitioners.

STATEMENT OF THE CASE

Petitioners seek review of the decision of the Court of Appeals which affirmed an order of the Federal Communications Commission (FCC) ruling that it had authority under the Communications Act of 1934 to preempt state regulation of terminal equipment interconnected with local telephone exchange equipment.

The clear division of authority between the state commissions and the FCC established by the Communications Act, 47 U.S.C. Sections 151, 152(a), has been dealt a serious blow by the decision below, despite the plain language of Sections 2(b) and 221(b) of the Act which indicates Congress' clear intent to preserve authority over intrastate communications to the states.

Earlier FCC decisions expressly recognized state jurisdiction over the connection of terminal equipment with intrastate communications. *Use of Recording Devices*, 11 FCC 1033 (1947); *Jordaphone*, 18 FCC 644 (1954); *Hush-a-Phone*, 22 FCC 2d 420 (1957). Then in *Carterfone*, 13 FCC 2d 420 (1968), *reconsideration denied*, 14 FCC 2d 571 (1968), the FCC held invalid provisions of interstate tariffs which prohibited the use of the Carterfone, a device used to interconnect radio communication systems to the telephone network. It is significant, though, that the FCC limited its ruling to interstate and foreign telephone service, and not intrastate service.

Subsequent to *Carterfone*, many state regulators became concerned that the continually increasing substitution of customer-provided equipment might adversely affect residential telephone users with regard to the quality and cost of their telephone service. Following preliminary investigations by NARUC, the North Carolina Utilities Commission, and the issuance of an advisory opinion by the Attorney General of Nebraska, the North American Telephone Association (NATA) filed a petition on August 8, 1975, requesting the FCC to invoke the declaratory order provisions of the Administrative Procedure Act, 5 U.S.C. Section 554 (e).

The validity of the February 5, 1974 Order issued by the FCC pursuant to NATA'S requests (see NARUC's appendix at page 36a) is at issue. In that Order the FCC declared that it had preempted state regulation of the connection of customer-provided terminal equipment to local telephone exchanges and intra-state switched telephone networks. The NARUC, the North Carolina Utilities Commission, the Southeastern Association of Regulatory Commissioners and several other parties sought review of the FCC Order by the Fourth Circuit Court of Appeals. On April 14, 1976, that Court handed down a 2-1 decision affirming the FCC Order. (see NARUC appendix, at la). Several petitioners before the Court of Appeals filed a petition for rehearing with the Court, which was denied on June 8, 1976. In the opinion of the PUCO, the issue of the validity of the FCC Order, Docket No. 19808, presents a fundamentally important question with respect to the proper spheres of jurisdiction of the FCC and the state commissions, and for that reason presents an eminently proper case for the grant of certiorari by this Court.

REASONS FOR GRANTING THE WRIT

The FCC order preempting state jurisdiction over the interconnection of terminal equipment represents the first attempt to distinguish the power of the states to regulate intrastate rates and services from the power to regulate the terms and conditions under which terminal equipment can be interconnected. Such a distinction is unwarranted in that the regulation of rates, services and equipment are inextricably intertwined. Because the increased use of customer-provided terminal equipment may divert revenues from the telephone companies and lead to increased charges for local residential users, the state's retention of jurisdiction over terminal equipment is crucial to its regulation of local rates. The Court of Appeals' sustaining of the FCC order is contrary to Congress' recognition that regulatory authority over charges and equipment should not be fragmented between different levels of government.

The Court of Appeals' decision is contrary to the legislative intent of the Communications Act. Section 2(b) of the Act, providing that the FCC may not use its jurisdiction over interstate communications to intrude upon the states' jurisdiction over intrastate communications, charges, services or facilities, reflects Congress' intent to preserve the then existing state jurisdiction over intrastate telephone traffic. In the opinion of the *amicus curiae*, this Court ought to review the Court of Appeals' sustaining of an FCC order which relied on a construction of the Communications Act that is contrary to the language and intent of the Act.

Further, this Court should grant certiorari to consider the basic principles of Federalism at issue. No

matter how the issue is resolved on the merits, this case presents a significant Federal question. If the decision of the Court of Appeals stands, the FCC will have preempted state authority in an area primarily of local concern and effect which should be left to regulation by the states. The economic effect of the increased use of customer-provided equipment will vary within individual localities and requires local overseeing. The ability of the states to protect the public against adverse effects will be weakened by the FCC's preemption of state authority to regulate the interconnection of terminal equipment. This raises crucial issues of Federalism which are eminently deserving of review by the Supreme Court of the United States.

CONCLUSION

Amicus curiae PUCO supports the petitions for a writ of certiorari of the judgment of the Fourth Circuit Court of Appeals in the consolidated case below and respectfully urges this Court to grant such Petitions.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

CHARLES S. RAWLINGS
Assistant Attorney General
Chief, Public Utilities Section

CHERYL K. HACHMAN
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
(614) 466-4395

Attorneys for Amicus Curiae
THE PUBLIC UTILITIES COMMISSION OF OHIO

APPENDIX

Statutory provisions referred to herein which are not set forth in the Appendices of the Petitioners.

Section 4905.02, Ohio Revised Code (1954)
4905.02 (614-2a). "Public utility" defined.

As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code, "public utility" includes every corporation, company, co-partnership, person, or association, their lessees, trustees, or receivers, defined in section 4905.03 of the Revised Code, including all telephone companies, but excepting such other public utilities as operate their utilities not for profit, such other public utilities as are owned or operated by any municipal corporation, and railroads as defined in sections 4907.02 and 4907.03 of the Revised Code.

Section 4905.03, Ohio Revised Code (1954)
4905.03 Definitions.

As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code:

(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(1) A telegraph company, when engaged in the business of transmitting telegraphic messages to, from, through, or in this state;

(2) A telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state and as such is a common carrier;

(3) A motor transportation company, when engaged in the business of carrying and transporting persons or property or the business of providing or furnishing

such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, for the public in general, over any public street, road, or highway in this state, except as provided in section 4921.02 of the Revised Code;

(4) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state;

(5) A gas company, when engaged in the business of supplying artificial gas for lighting, power, or heating purposes to consumers within this state or when engaged in the business of supplying artificial gas to gas companies or to natural gas companies within this state, but a producer engaged in supplying to one or more gas or natural gas companies, only such artificial gas as is manufactured by such producer as a by-product of some other process in which such producer is primarily engaged within this state is not thereby a gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between any gas company and any other gas company or any natural gas company providing for the supplying of artificial gas and for compensation for the same, are subject to the jurisdiction of the public utilities commission, whether or not such rates, rentals, tolls, schedules, charges, or agreements were agreed upon or put into effect prior to July 10, 1933;

(6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, but where a producer supplies to one or more gas or natural gas companies only such gas as

is produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, such producer is not thereby a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same, are subject to the jurisdiction of the public utilities commission, whether or not such rates, rentals, tolls, schedules, charges, or agreements were agreed upon or put into effect prior to July 10, 1933. The commission may, upon application made to it, relieve any producer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, so long as such producer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as such producer does not engage in the distribution of natural gas to consumers;

(7) A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state;

(8) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

(9) A heating or cooling company, when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes;

(10) A messenger company, when engaged in the business of supplying messengers for any purpose;

(11) A street railway company, when engaged in the business of operating as a common carrier, a railway, wholly or partly within this state, with one or more tracks upon, along, above, or below any public road, street, alleyway, or ground, within any municipal corporation, operated by any motive power other than steam and not a part of an interurban railroad, whether such railway is termed street, inclined-plane, elevated, or underground railway;

(12) A suburban railroad company, when engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad;

(13) An interurban railroad company, when engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights of way, outside of municipal corporations, using electricity or other motive power than steam power for the transportation of passengers, packages, express matter, United States mail, baggage, and freight. Such interurban railroad company is included in the term "railroad" as used in section 4907.02 of the Revised Code;

(14) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

(B) "Motor-propelled vehicle" means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

Section 4905.04, Ohio Revised Code (1954)

4905.04 Power to regulate public utilities and railroads.

The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

Section 4905.06, Ohio Revised Code (1954)

4905.06 (614-8). General supervision.

The public utilities commission shall have general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and shall have power to examine such public utilities and keep informed as to their general condition, capitalization, and franchises and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. The commission,

through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility.

Section 4905.22, Ohio Revised Code (1954)

4905.22 (614-12) (614-13). Service and facilities required; unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.